1990

Gary Griffiths, Kevin G. Meeham, and Patrick B. Meeham, and Marian J. Meeham v. J. Dallas Vanwagoner : Brief of Respondent

Utah Supreme Court

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BRIEF

DOCKET NO. 900595 IN THE SUPREME COURT OF THE STATE OF UTAH

GARY GRIFFITHS, as guardian ad litem for KEVIN G. MEEHAN, and PATRICK B. MEEHAN; and MARIAN J. MEEHAN,

Plaintiffs/Appellants,

vs.

J. DALLAS VANWAGONER,

Defendant/Respondent.

Case No. 900595

Priority No. 16

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
JUDGE PAT B. BRIAN

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LIST OF PARTIES TO THE ACTION

The caption of the case contains the names of all parties to the action.

JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) (1987 replacement volume & supp. 1990).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

A. Issues.

The following issues are presented for review:

1. Is the 2-year statute of limitations set for in Utah Code Ann. § 78-14-4 (1987), as it applies to minors, unconstitutional under the due process, "open courts," and equal protection clauses of the Utah Constitution (Art. I, §§ 7, 11 and 24, respectively)?

2. Is the 4-year statute of repose included in Utah Code Ann. § 78-14-4 (1987) unconstitutional under the due process, "open courts," and equal protection clauses in Art. I, §§ 7, 11 and 24 of the Utah Constitution, respectively?

3. Do the terms of the 2-year statute of limitations included in Utah Code Ann. § 78-14-4 (1987) apply to mentally disabled, minor plaintiffs?

B. Standard of Review.

All three of the above issues present questions of law only, and conclusions reached by the trial court are, therefore, accorded no particular deference. This Court should review those conclusions for correctness. See Kelson v. Salt Lake County, 784 P.2d 1152, 1154 (Utah 1989); City of West Jordan v. Utah State Retirement Board, 767 P.2d 530, 532 (Utah 1988).

RELATED APPEALS

Lee v. Gaufin, Case Nos. 20995 and 21063, involves virtually identical issues to those presented in this case. Lee v. Gaufin has been fully briefed and argued and is presently pending before this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant provisions and statutes are as set forth in the Brief of Appellants on pg. 3.

STATEMENT OF CASE

A. Nature of Case, Course of Proceedings and Disposition in Court Below.

Defendant/Respondent J. Dallas VanWagoner ("defendant") agrees with the description of the nature of the case, course of proceedings and disposition as set forth in the Brief of Plaintiffs and Appellants, Gary Griffiths as guardian ad litem for Kevin G. Meehan and Patrick B. Meehan; and Marian J. Meehan ("plaintiffs").

B. Response to Plaintiffs' Statement of Facts.

1. On July 27, 1981, Mrs. Marian J. Meehan gave birth to premature twins, Kevin and Patrick Meehan. Record at 152.

2. In their Complaint, plaintiffs allege negligent treatment by defendant resulted in brain damage to the two 28-week twins following a premature labor and delivery. Record at 3.

3. Plaintiffs served a Notice of Intent to Commence Medical Malpractice litigation on or about August or September, 1988. Record at 157.

4. On or about January 6, 1989 plaintiffs filed a Complaint in this action in the Third Judicial District Court of Salt Lake County, State of Utah. Plaintiffs caused a Summons and Complaint to be served on defendant on or about January 20, 1989. Record at 2.

5. On May 16, 1990 defendant filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure. The grounds for defendant's motion was that the Utah Healthcare Malpractice Act, Utah Code Ann. § 78-14-4 (1987) bars plaintiffs' claims. Record at 31-32.

6. The District Court entered an Order of Dismissal With Prejudice in favor of defendant on or about December 6, 1990. Record at 166. A copy of the court's Findings of Fact, Conclusions of Law and Order are included as Exhibit "A" in the Addendum hereto.

SUMMARY OF ARGUMENTS

Utah Code Ann. § 78-14-4 does not violate the rights of minors under the "open courts," "due process," or "equal protection" provisions of the Utah Constitution.

The open courts analysis articulated in Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985), is not applicable because no abrogation or denial of a remedy is involved in this case. Even if the Berry analysis were applied, it would be satisfied because § 78-14-4 allows comparable substantive protection and is a reasonable means of achieving the elimination of a clear social or economic evil.

Substantive due process analysis is properly applied only in cases of "extreme arbitrariness," of which this case is not one. Nonetheless, under Utah law, substantive due process analysis in cases such as this is indistinguishable from the Berry analysis and, as discussed under the open courts section of this brief, § 78-14-4 passes constitutional muster under that analysis.

Equal protection analysis in this case should apply the "rational basis" standard of review because § 78-14-4 does not deny any constitutional right under the "open courts" provision. Under a rational basis test, § 78-14-4 is reasonably appropriate to accomplish its intended purpose and therefore constitutional. Even if an intermediate standard of review were applied, any statutory classifications which might exist have been found to be reasonable and in fact substantially further the legislative purpose.

The four year statute of repose in § 78-14-4 also satisfies the Berry test, as recognized by this Court in Berry itself.

As a matter of statutory construction, the two year statute of limitations in § 78-14-4 does apply to the two minor appellants. Section 78-14-4 is the express result of the legislature's decision to leave adults and minors with medical malpractice claims on equal footing.

ARGUMENT

POINT I

THE APPLICATION OF THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS TO MINORS IS CONSTITUTIONAL.

The first issue raised by plaintiffs is whether the Utah legislature may constitutionally exclude the minors tolling statute, Utah Code Ann. § 78-12-36, from applying to the medical malpractice statute of limitations, Utah Code Ann. § 78-14-4. Plaintiffs challenge the constitutionality of Utah Code Ann. § 78-14-4 as applied to minors on three grounds: (1) the statute violates Article I, Section 11 of the Utah Constitution relating to a litigant's right of access to the courts, (2) the statute violates Article I, Section 7 of the Utah Constitution relating to due process, and (3) the statute violates state constitutional guarantees of equal protection of laws (Article I, Section 24). (Appellant's Brief, pp. 5-15).[1/]

A. § 78-14-4 does not violate the rights of minors under the "Open Courts" provision of the Utah Constitution.

Article I, Section 11 of the Utah Constitution is referred to as the "Open Courts" provision based upon its declaration that "[a]ll courts shall be open, and every person, for an injury done to him in his person, . . . shall have a remedy by due

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[1/] In this appeal, plaintiffs have not distinguished between their varying individual circumstances as they apply to the issues raised. Both Kevin and Patrick Meehan were minors at the commencement of this action. A guardian ad litem, Gary Griffiths filed claims on their behalf. Their mother Marian Meehan Griffiths, however, is also a plaintiff and appellant in this action and was not a minor at the commencement of the action. Thus, plaintiffs' argument on the statute of limitations as applied to minors does not pertain to Marian Meehan Griffith's claims.

course of law." See Berry v. Beech Aircraft Corp., 717 P.2d 670, 674 (Utah 1985). The Utah Supreme Court has recognized that no one has a vested right in a common law cause of action and the legislature may pass laws restricting or abrogating rights of action. Such laws, however, must pass constitutional muster. Id. at 675-76.

In Berry, this Court held that the open courts provision and the prerogative of the legislature are properly accommodated by a specific two-part analysis. Id. at 680. The first part was articulated by the Court as follows:

> First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different.

Id. at 680.

The analysis articulated in Berry is thus premised on the abrogation of a remedy. The instant case does not involve an abrogation of a remedy, and, even if it did, comparable substantive protection is afforded.

Utah Code Ann. § 78-14-4 treats all injured persons equally. Minors and incompetents have the same remedies available to them that competent adults possess. The only difference is that the action must be pursued by a guardian on behalf of the minor or incompetent, which would be the case regardless of the application of statute of limitations. Because both Patrick and Kevin Meehan were permanently mentally disabled, striking the statute of limitations would not provide them any further remedy.

They would still have to rely upon a guardian to bring an action on their behalf. To suggest, as plaintiffs do, that Kevin and Patrick were deprived because no one could act for them is inaccurate. They were deprived or disabled by their condition - not by any act of the legislature. According to plaintiffs, Kevin and Patrick will never be able to bring their own claims because of their personal disability.

It is certainly reasonable to put a limit on the time in which a guardian has to bring the claims on a minor's behalf. To do otherwise would bring about the absurd result that a mentally disabled person would have his or her entire life span to bring a claim relating to negligence at the time of birth.

Moreover, experience has shown that, in reality, minors have had comparable substantive protection of their rights. Current statistics demonstrate that one-seventh of all medical malpractice claims involve minors. Jenkens, California's Medical Injury Compensation Reform Act, An Equal Protection Challenge, 52 S. Cal. L. Rev. 829, 960-61 (1979). In Utah, assuming that one-seventh of the 30 malpractice claims being filed each month are brought by minors, 51 malpractice claims are being brought by minors within the statutory periods each year. In contrast, only four tardy claims, stating constitutional challenges against Utah Code Ann. § 78-14-4 have surfaced in the fifteen-year period since Utah Code Ann. § 78-14-4 was enacted in 1976. See Hargett v. Limberg, 598 F. Supp 152 (D. Utah 1984); Blum v. Stone, 752 P.2d 898 (Utah 1988); Lee v. Gaufin, Case Nos. 20995 and 21063 (currently pending before this court); and the instant case.

Furthermore, it is evident that minors' medical malpractice claims are being both heard and vindicated in Utah courts with increasingly greater damage recoveries being awarded. In 1983, a Utah jury awarded $4,775,000 to the mother of a child who was born a spastic quadriplegic because of an attending physician's misuse of a labor inducing drug. Jury Verdict Research, Inc. Personal Injury Verdict Survey, Utah Edition 7 (1983). In Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832 (Utah 1984), this Court affirmed a $1.5 million jury verdict in a products liability action brought by the parents of Elizabeth Ann Barson, who suffered serious birth defects resulting from negligent prenatal administration of a progestational drug. These and other cases, coupled with the number of timely claims made by Utah minors demonstrate that the Utah courts' doors are open to all medical malpractice claims whether brought by adults or on behalf of minors.

The Constitution has never required special, separate treatment of minors. "It is within the legislative competency" of states to make special exceptions in [minors'] favor or not." Vance v. Vance, 108 U.S. 514, 521 (1888); see also Murray v. City of Milford, 380 F.2d 468, 473 (2nd Cir. 1967); Maine Medical Center v. Cote, 577 A.2d 1173, 1177 (Maine 1990); Shaw v. Zabel, 517 P.2d 1187, 1188 (Ore. 1974); Lametta v. Connecticut Light & Power Co., 92 A.2d 731, 733 (Conn. 1952). In Hargett v. Limberg, 598 F. Supp. 152 (D. Utah 1984) (reversed on other grounds) Judge Winder specifically stated:

> It is universally accepted that a legislature may put adults and infants on the same footing with respect to statutes of limitations without affecting constitutional rights.

598 F. Supp. at 156. Because minors have no special rights beyond others, removal of the exception of the Utah tolling statute, should not be viewed as an "abrogation of a remedy or cause of action" within the meaning of the Berry open courts analysis.

Even if an abrogation were involved and no comparable substantive protection provided, § 78-14-4, is justified under the second part of the Berry analysis:

> Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

Berry, 717 P.2d at 680.

In Allen v. Intermountain Health Care, 635 P.2d 30 (Utah 1981), this court upheld the constitutionality of § 78-14-4 as applied to adults. The Court considered the express legislative findings regarding the mounting medical malpractice insurance crisis and recognized the justification for application of the statute of limitations:

> It is therefore seen that the [Utah Health Care Malpractice Act] was premised on the need to protect and insure the continued availability of health care services to the public, and not (as asserted by plaintiff) to shield insurance companies from legitimate claims. The legislature exercised its discretionary prerogative in determining that the shortening of the statute of limitation (along with requiring notice of intention to sue), would insure the continued availability of adequate health care services.

Allen, 635 P.2d at 32. If § 78-14-4 is reasonable and justified for adults, then surely it is for minors as well.

As this case demonstrates, if the legislature were precluded from applying the statute of limitations, malpractice claims could be brought at anytime. The statute of limitations for a medical malpractice claim for Kevin and Patrick and other mentally disabled persons would never commence to run, and an action on their behalf could be instituted many decades after the cause of action allegedly arises. The potential liability of health care providers and the exposure to liability of professional malpractice liability insurers would become increasingly unpredictable and indefinite. Defendants would be unable to determine the extent of personal exposure and insurers would be unable to calculate premiums to cover their exposure.

Because the insurance industry depends on predictability to determine premiums and maintain sufficient reserves, many insurers would respond to the threat of uncertainty and problems related to defending against stale claims by withdrawing from malpractice liability insurance markets. Note, The Indiana Medical Malpractice Act: Legislative Surgery on Patient's Rights, Vol. 10, Val. U. L. Rev. 303, 305 n. 10 (1976).

It was the specter of this medical malpractice crisis which led the Federal District Court for the District of Utah to conclude:

> [T]he exclusion of minors and legally incompetent persons from the general tolling provisions (Utah Code Ann. § 78-12-36) is rationally related to the stated purpose of containing the malpractice insurance crisis. That rationality is particularly evidenced by the facts of the present case. Serious permanent injuries to children are often cases of large

> potential damages. If the period in which such claims could be brought were tolled until the young child reached the age of majority, a heavy burden would be placed on insurance carriers in evaluating and defending against the claim, establishing appropriate reserve requirements, and setting rates. The percentage of medical malpractice claims brought by minors is far from insignificant. Moreover, the uncertainty inherent in tolling the period in which such claims may be brought could drastically affect insurance rates . . .

Hargett v. Limberg, 598 F. Supp. at 158 (reversed on other grounds). Hence, § 78-14-4 is absolutely necessary to insure the continued availability of health care services in Utah by containing the malpractice insurance crisis. The malpractice insurance crisis is a "clear social and economic evil" to be eliminated and § 78-14-4 is a reasonable means for achieving that objective.

In Berry, this Court expressly recognized that the Allen decision upholding the constitutionality of § 78-14-4 is consistent with the Berry open courts analysis. Berry, 717 P.2d at 683. The medical malpractice statute of limitations as applied to minors is not unconstitutional under the open courts test adopted by the court in Berry.

B. § 78-14-4, as applied to minors, does not violate the Due Process clause of the Utah Constitution.

The due process provision of the Utah Constitution provides:

> No person shall be deprived of life, liberty or property, without due process of law."

Utah Constitution, Art. I, § 7.

Federal courts abandoned any application of federal substantive due process analysis long ago. Condemarin v. University Hospital, 775 P.2d 348, 369 (Utah 1989)

(Stewart). Although not wholly abandoned in some states, including Utah, substantive due process analysis is applied only in cases of "extreme arbitrariness." Id.

In Condemarin, Justice Stewart found that a statute placing a complete bar on recovering any damages in excess of $100,000 from a governmental entity did not involve the extreme arbitrariness which would warrant substantive due process analysis. Id. Certainly then, the instant case which involves a statute placing a mere time limit on the filing of claims is not one of extreme arbitrariness. The more appropriate analysis for this case is the equal protection analysis discussed under Point I.C. Id. See Allen at 32.

Nonetheless, if this Court were to find "extreme arbitrariness" in the application of § 78-14-4 in this case, the appropriate due process analysis would be virtually identical to the "classic due process analysis" embodied by the two-part Berry test discussed above under Point I. A. See Condemarin, 775 P.2d at 357 (Durham) and at 369 (Stewart). The test articulated in Berry is essentially a due process balancing test in which "the exigencies associated with the social or economic evils addressed by the legislation are weighed against the reasonableness of its intrusion on personal rights." It also includes a separate "substitute remedy" due process test. Condemarin, 775 P.2d at 360 (Durham) and at 367 (Zimmerman). As explained under Point I.A., supra, § 78-14-4 passes constitutional muster under the two-part Berry analysis.

C. § 78-14-4, as applied to minors, does not violate the Equal Protection clause of the Utah Constitution.

Utah's Equal Protection clause, Article I, Section 24 of the Utah Constitution provides: "All laws of a general nature shall have uniform operation."

> The first step in applying Article I, Section 24 is to determine the appropriate standard of review for evaluating the lawfulness of the discriminatory classifications. Not all such classifications are unconstitutional.

Condemarin, 775 P.2d at 372 (Utah 1989) (Stewart).

The "strict scrutiny" standard of review applies only where legislation creates a "suspect class" or affect a "fundamental right." Malan v. Lewis, 693 P.2d 661, 674 n. 17 (Utah 1984). The United States District Court for the District of Utah has already rejected the argument for applying a "heightened scrutiny" standard of review to a minor's constitutional challenge to the Utah medical malpractice statute of limitations:

> Unlike alienage, illegitimacy or gender, the class of minors with medical malpractice claims does not involve a fundamental interest or a classification of a suspect character . . . The correct standard for equal protection analysis to be applied in this case under both the United States and Utah Constitutions is the rational basis test.

Hargett v. Limberg, 598 F.Supp. 152, 157 (D. Utah 1984).

Where a constitutional right is denied, however, this Court has recognized the appropriateness of applying an "intermediate" or "heightened" standard of review. Condemarin, at 373 (Stewart); Malan, at 671. It is this intermediate standard which plaintiffs urge the Court to apply in instant case.

When the discrimination reviewed under the Equal Protection clause does not deny a constitutional right under Article I, Section 11, the standard of review is less stringent than the standard applied when a constitutional right is abrogated. Id. at 375. The validity of the discrimination will then turn upon "whether the classification is arbitrary

in light of the presumed purposes of the statute." Id. This is the "rational basis test." See Malan v. Lewis, 693 P.2d 661, (Utah 1984); Allen, 635 P.2d at 31; Hargett, 598 F. Supp. at 157; Maine Medical, 577 A.2d 1176. Because, as discussed above under Point I. A., this case does not involve the denial of any right under Article I, Section 11, the rational basis test should be applied.

Section 78-14-4, must be held to be a constitutional exercise of the Utah legislature's prerogative unless plaintiff can clearly establish that the statute does not meet the requirements of the rational basis standard of review. To satisfy the rational basis test, the statute must first apply equally to all members of the created class. Malan v. Lewis, Id. The class created and protected by the Act is health care providers. See Allen v. Intermountain Health Care, Inc., 634 P.2d 30, 31 (Utah 1981). Utah Code Ann. § 78-14-4 applies equally to all health care providers and therefore complies with the first prong of the rational basis test.

The statute also treats equally the affected group, those persons, including minors, who have personal injury claims against health care providers. The classification of minors who are tort victims of health care providers as opposed to minors who are victims of other tort-feasors[2/] is rationally related to the legitimate state interest of controlling malpractice insurance costs and ensuring continued health care services in this

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[2/]This classification is really created by the minors tolling statute, Utah Code Ann. § 78-12-36. Utah Code Ann. § 78-14-4 merely excludes its application to malpractice claims, assuring that all injured persons are treated equally.

state. See generally Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implication, 55 Tex. L. Rev. 759 (1977).

Second, to satisfy equal protection review, the different treatment afforded the protected class must have a "reasonable tendency" to further the legislative objective. Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984). In Allen, this Court reviewed the legislative objective behind the Utah Health Care Malpractice Act and held that the Act and its statute of limitations has such a tendency. Allen at 32.

Judicial review of legislation does not include a reevaluation of the facts the legislature could have considered to determine the necessity for the enactment. The constitutionality of a measure under the equal protection clause does not depend on a court's hindsight assessment of the empirical success or failure of the measure's provisions. As Justice Brennan explained in Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 466 (1981): "whether in fact the Act will promote the [legislative objectives] is not the question: the Equal Protection Clause is satisfied by our conclusion that the [state] Legislature could rationally have decided" that the means chosen will promote the legislative objectives. (Emphasis added). Where there was evidence before the Legislature which, if believed to be true, supported the creation of the statutory classification, a plaintiff cannot invalidate the statute by tendering evidence to support an argument that the Legislature may have been mistaken. Cloverleaf, 449 U.S. at 466.

The Federal District Court for Utah stated that the burden of weighing the need to contain malpractice insurance costs and the medical malpractice crisis in general and

thereby to ensure the availability of health care services against the competing interests of minors and mental incompetents whose parents or guardians fail to timely initiate an action is a problem to be handled by the legislature, not the courts. Hargett, 598 F. Supp at 158. The reasons for leaving the balancing process to the legislature are important:

> [A]ny possible harm that may be suffered by a minor whose parents or guardians fail to initiate the action against a potential tortious wrongdoer within the appropriate time period may be outweighed by the chaos, uncertainty, and severe prejudice which will occur to those accused of tortious conduct, their insurance carriers, and ultimately to the insurance carriers' rate payers when lawsuits are permitted to be initiated decades after the occurrence of the incident giving rise thereto. Before such a sweeping change is made the question of 'reserve requirements' imposed on insurance carriers and the resulting effect on insurance rates as well as many other issues must be addressed. The Legislature, not the courts, is the proper forum for the resolution of such issues. (Emphasis added).

De Santis v. Yaw, 434 A.2d 1273, 1279 (Pa. Super. 1981).

Indeed, in almost all areas, the law expects the parents or guardians will look after and protect the child's interest. Absent the presence of a fundamental right, parents are expected and allowed to exercise broad decision-making authority over their children. Bellotti v. Baird, 443 U.S. 622 (1979); Parham v. J.R., 442 U.S. 584, 602-03 (1979).

Based upon sound and well-reasoned authorities, appropriate principles of judicial review, and legislative objectives underlying the Act and its statute of limitations, it is evident that Utah Code Ann. § 78-14-4 complies with federal and state guarantees of equal protection of laws and does not deny plaintiffs access to the courts.

Other jurisdictions which have analyzed equal protection and due process attacks by minor plaintiffs against medical malpractice statutes of limitations have reached similar results. An example is the recent decision of the Supreme Court of Maine in Maine Medical Center v. Cote, 577 A.2d 1173 (Me. 1990).

In Cote, the plaintiffs contended that Maine's medical malpractice statute of limitations[3/] violated the "open courts" of the Maine Constitution by effectively precluding a child under the age of 12 when a cause of action accrues from bringing an action its own name. The Court stated:

> We do not construe [the open courts provision] as prohibiting reasonable limits on the time within which a claimant may seek redress in the courts. The absence of a tolling provision for a legal disability thus making a claimant dependent on another to assert his rights does not per se offend [the open courts provision]. The only issue of constitutional significance is whether such time limits are so unreasonable as to deny meaningful access to the judicial process.

577 A.2d at 1176. The Court held that the Maine statute's limitations were not so unreasonable and thus passed constitutional muster under the open courts provision. Id.

[3/] The Maine statute provided:

> Actions for professional negligence shall be commenced within 3 years after the cause of action accrues. For the purpose of this section, a cause of action accrues on the date of the act or omission giving rise to the injury. Notwithstanding the provisions of Title 14, section 853, relating to minority, actions for professional negligence by a minor shall be commenced within 6 years after the cause of action accrues or within 3 years after the minor reaches the age of majority, whichever occurs first.

24 M.R.S.A. Section 2902 (1990).

The Maine Court then went on to consider the plaintiffs' second argument, that the statute violated the equal protection clause of the Maine constitution by unfairly discriminating against minors with a claim of medical malpractice as opposed to minors with claims based on other types of negligence. Id. The Court declined to apply a "strict scrutiny" analysis, noting "that the pursuit of a negligence action is not a fundamental right" and, furthermore, that the United States Supreme Court in Vance v. Vance, 108 U.S. 514 (1883) held that the federal constitution "gives to minors no special rights beyond others," and "it [is] within the legislative competency" of states "to make exceptions in their favor or not." Id. Instead the Court applied a rational basis standard.

Recognizing that a statute of limitation is "of necessity a potent element in any reform of tort law," and that "[the] production of records and evidence necessary to meet medical malpractice claims becomes progressively more difficult with time," the court stated:

> As a court we must assume that [the statute of limitations] represents the legislature's considered judgment concerning the most effective manner of decreasing premium costs of medical professional liability insurance. "It is not necessary that the methods adopted by the legislature be the best or wisest choice. No matter how much the court might have preferred some other procedure, if the measure is reasonably appropriate to accomplish the intended purpose, we must give it effect.

Id. at 1177. Applying this standard, the Court held that the Maine statute was rationally related to the stated legislative purpose. Id. A substantial number of other state courts have held likewise.[4/]

Federal courts have reached the same conclusion concerning the operation of statutes of limitation against minors' claims. In Robbins v. United States, 624 F.2d 971, 972 (10th Cir. 1980) the Court of Appeals for the Tenth Circuit held that "[I]t is well established that a claimant's minority does not toll the running of the statute of limitations under the Federal Tort Claims Act." In Brown v. United States, 353 F.2d 578, 579 (9th Cir. 1965), the court stated that minority does not toll the statute of limitations, and the

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[4/]See e.g., Donabedian v. Manzer, 200 Cal. Rptr. 597 (Cal. App. 1 Dist. 1984); Kite v. Campbell, 191 Cal. Rptr. 363 (App. 1983) (statute providing that medical malpractice actions by a minor must be commenced within three years from the date of the alleged wrongful act did not deny a minor's right to due process under law; as a matter of constitutional law, a statute of limitation is remedial in nature and does not destroy fundamental rights); Wheeler v. Lenski, 658 P.2d 1056 (Kan. App. 1983) (statute which shortens period of limitation for minors and incapacitated persons in medical malpractice actions did not violate equal protection or due process); Petri v. Smith, 453 A.2d 342 (Pa. Super. 1982) (the settled rule is that it is not violative of any constitutional rights to hold minors bound equally with adults to the prescribed statutory periods within which legal causes of action may be brought); Reese v. Rankin Fite Memorial Hospital, 403 So.2d 158 (Ala. 1981) (statute of limitations did not violate due process and equal protection provisions of state or federal constitutions on ground that statute created minors injured through medical malpractice differently from minor victims of other torts); Thomas v. Niemann, 397 So.2d 90 (Ala. 1981) (minor's medical malpractice action was barred by the statute of limitations and was properly dismissed); Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585 (Ind. 1980) (time limitation effecting medical malpractice claim for death of a minor child was not contrary to due process and equal protection); Rohrabaugh v. Wagoner, 413 N.E.2d 891 (Ind. 1980) (court held that the legislature was not constitutionally mandated to suspend application of statutes of limitation in cases of infancy or incapacity and dismissed appeal which challenged constitutionality of statute of limitations of medical malpractice act).

parents or guardians of a minor must preserve his claim by timely action. Finally, in Pittman v. United States, 341 F.2d 739, 741 (9th Cir.), cert. denied, 382 U.S. 941 (1965), the Supreme Court found that equal protection guarantees are not violated by applying shortened statute of limitations to a minor's claim.

Even if this Court were to apply the intermediate standard of equal protection review applied by Justice Stewart in Condemarin, § 78-14-4 passes the test. While the intermediate standard has more bite than the minimum scrutiny standard, it does not require the legislature to find the least restrictive manner of furthering its purpose. The statutory classifications must be reasonable and the statute must in fact reasonably and substantially further the legislative purpose. Condemarin, 775 P.2d at 373 (Stewart).

> The determination of reasonableness must take into account the extent to which the constitutional right ... is diminished and the extent to which the burden imposed actually furthers the legislative goals, as well as the importance of those goals.

Id. This Court considered these factors in Allen and upheld the constitutionality of § 78-14-4. See discussion, pp. 8-9, supra.

POINT II

THE FOUR YEAR STATUTE OF REPOSE IN THE UTAH HEALTH CARE MALPRACTICE ACT IS CONSTITUTIONAL.

Plaintiffs argue that the four year medical malpractice statute of repose (Utah Code Ann. § 78-14-4 [1987]) violates the due process, open courts, and equal protection clauses in the Utah Constitution. Appellants' Brief, pp. 44-47. Essentially, however, plaintiffs' argument is that all statutes of repose must be analyzed under the two-part test

adopted by the court in Berry and that the Medical Malpractice four year statute of repose included in § 78-14-4 does not pass the test.

In support of their argument, plaintiffs rely on Berry, Sun Valley Waterbeds v. Hughes and Sun, 782 P.2d 188 (Utah 1989) and Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989). All of those cases, however, are distinguishable from the instant case.

In Berry, the Utah Supreme Court applied the two-part test (described above under Point I.A.) to invalidate a statute of repose included in the Utah Product Liability Act, Utah Code Ann. § 78-15-1, et seq. (1953). The Court concluded that the Utah statute of repose with respect to product liability did not reasonably and substantially advance the stated purpose of the statute. The Court further held that the effect of the statute in that regard was "more fanciful than real," citing Malan v. Lewis, 693 P.2d 661, 673 (Utah 1983), and whatever beneficial effects may have accrued from the statute of repose did not justify the denial of rights protected by Article I, Section 11. Berry, 717 P.2d at 683.

The Berry Court, however, specifically stated:

> Prior Utah cases which have addressed the constitutionality of other statutes of repose are not inconsistent with our holding in this case. Allen v. Intermountain Health Care, Inc., 635 P.2d 30 (Utah 1981), sustained the constitutionality of the medical malpractice statute of repose against challenges based on Utah's equal protection of the laws provision, Article I, Section 24, and the Utah constitutional prohibition against enactment of special laws, Article XI, Section 26. No issue was raised as to the constitutionality of the statute under Article I, Section 11. Beyond that, there was no showing that

> the legislative purpose in enacting the statute would not be achieved. (emphasis added.)

Berry, 717 P.2d at 683. If, as plaintiffs argue, there is really no difference between an equal protection and open courts analysis as applied to the instant case, this Court has already upheld the constitutionality of the medical malpractice statute of repose in Allen.

In Horton and Sun Valley Waterbeds this Court followed the Berry test in holding that the Utah Architects and Builders statute of repose violated the open courts provision of Utah's constitution. As in Berry, the Court based its holding on a finding that there was no clear social or economic evil that the Architects and Builders statute of repose was aimed at, and that the legislature had identified none. See Horton, 785 P.2d at 1094. Moreover, the Court, in Horton, Sun Valley Waterbeds and Berry noted as an important factor the apparent counterproductivity of the statute at issue. In Sun Valley Waterbeds the court stated:

> The statute of repose may be counterproductive in terms of public safety since the statute provides architects and builders with less incentive to take adequate precautions in the designing and building of improvements that have a useful life beyond seven years.

782 P.2d at 193. It is difficult to conceive how the medical malpractice statute of repose could be counterproductive like the architects and builders statute or the product liability statute. As recognized in Berry, this Court has already accepted the constitutionality of the medical malpractice statute of repose. It is therefore unnecessary for the record[5/]

[5/] If this court were to accept plaintiffs' arguments supporting application of an standard of review shifting the burden to defendant to establish the existence of a medical malpractice insurance crisis and that § 78-14-4 operates to reasonably and

in this case to establish that the medical malpractice four-year statute of repose reasonably and substantially advances its stated purpose.

POINT III

THE MEDICAL MALPRACTICE TWO YEAR STATUTE OF LIMITATIONS DOES, BY ITS TERMS AND AS A MATTER OF LAW, APPLY TO THE TWO MINOR PLAINTIFFS.

Plaintiffs contend that both Kevin and Patrick Meehan were continuously mentally disabled during the seven years between their birth and the commencement of this action. Thus, plaintiff argues, they were incapable of understanding the concept of fault and discovering their injury within the meaning of the two-year medical malpractice statute of limitations.[6/] Appellant's Brief, pp. 47-48. Unlike the other issues plaintiffs have raised on appeal, this is not a constitutional question, but rather a question of statutory interpretation.

In Hargett Judge Winder considered and rejected the very argument plaintiffs make here. The court noted that the actual plaintiff in the action was the guardian ad litem. 598 F. Supp. at 155. The plaintiffs contended that the neglect of a plaintiff guardian ad litem in failing to commence an action should not be attributed to a minor-patient. In support of that argument, they cited cases from the child support area indicating that a

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help solve that crisis, it should remand this case to the trial court for an evidentiary hearing as the Idaho Supreme Court did in Jones v. State Board of Medicine, 555 P.2d 399 (Idaho 1976). Any other approach would deprive defendant of constitutional due process.

[6/] As with plaintiffs' argument discussed under Point I, supra, this third issue on appeal has no application to the plaintiff parent, Marian Meehan.

child's vested right to child support could not be cut off due to the neglect or other failure of its parents. Id.

Judge Winder noted that in Scott v. School Board of Granite School District, 568 P.2d 746 (Utah 1977), the Utah court "characterized the general tolling provision as an expression of 'the general legislative intent to protect the causes of minors'." 598 F. Supp. at 156. Judge Winder went on to state:

> By contrast to the weighing process in the area of paternity and child support found by the Utah Supreme Court, the Utah legislature expressly came to a different conclusion in weighing the policies favoring protection of the rights of minors with medical malpractice claims against the public's interest in containing the costs of medical malpractice insurance.

Id. The Court noted that the express language of the medical malpractice statute of limitations was in direct response to the Utah court's pronouncement in Scott of the general policy favoring protection of the causes of minors and consequently rejected the plaintiff's argument. Id. This Court should do the same in the instant case.

CONCLUSION

The district court applied sound precedents of this court to conclude that equal treatment of minors and adults under the Utah Health Care Malpractice Act was a constitutionally valid exercise of legislative prerogative. Regardless of the standard of review applied under open courts, due process or equal protection analysis, Utah Code Ann. § 78-14-4 is constitutional as applied to both minors and adults.

The action of the Utah Legislature in enacting the Utah Health Care Malpractice Act and its statute of limitations is an appropriate response to a legitimate and real concern. It is, after all, the public which ultimately pays the cost of professional liability insurance and benefits from the continued availability of such coverage when injuries are suffered. In the furtherance of that objective, the Legislature reasonably required all persons, including minors, to present claims timely, which is essential to give insurers a reasonable opportunity to reduce losses in an extremely volatile insurance market. The Legislature also perceived that in medicine, where advances in procedures, knowledge and technology occur too rapidly, a long delay in the prosecution of an action seriously and detrimentally affects a health care provider's ability to defend care that may have been standard when rendered, but which may seem ineffectual or even harmful in retrospect.

It was the legislature's intent that the statute of limitations included in Utah Code Ann. § 78-14-4 apply to minors and mentally disabled persons in addition to competent adults. The district court properly applied the statute to the minor plaintiffs in this case.

For the foregoing reasons, defendant/respondent respectfully urge the Court to affirm the decision of the court below.

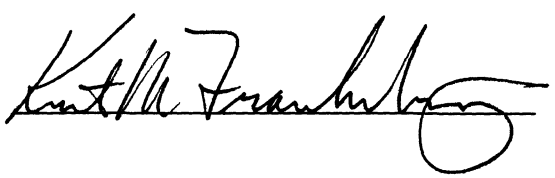
DATED this 29TH day of August, 1991.

WILLIAMS & HUNT

By _____
ELLIOTT J. WILLIAMS
KURT M. FRANKENBURG
Attorneys for Defendant/
Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief of Respondent, postage prepaid thereon, by first class mail in the United States Mail, to Roger P. Christensen and Richard L. Evans, CHRISTENSEN, JENSEN & POWELL, attorneys for plaintiffs/appellants, 175 South West Temple, Suite 510, Salt Lake City, Utah, 84101, on this 29th day of August, 1991.



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ADDENDUM

Exhibit A

OCT 29 [illegible]

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

GARY GRIFFITHS, as guardian ad litem for KEVIN G. MEEHAN, and PATRICK B. MEEHAN; and MARIAN J. MEEHAN, Plaintiffs, vs. J. DALLAS VanWAGONER, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Civil No. 89-0900111-CV Judge Pat B. Brian

This action came on regularly for hearing on September 28, 1990, before the above-entitled Court, the Honorable Pat B. Brian, presiding. The plaintiffs appeared by and through their counsel, Roger Christensen and Richard Evans of Christensen, Jensen & Powell, and defendant appeared by and through his counsel, Elizabeth King of Snow, Christensen & Martineau. Defendant moved for dismissal of plaintiffs' Complaint for failure to comply with the relevant statute of limitations encoded in Section 78-14-4, Utah Code Ann. (1953 as amended), and

plaintiffs moved to strike defendant's statute of limitations defenses.

After hearing oral argument and reviewing the memoranda on file, the Court now makes the following:

FINDINGS OF FACT

1. On July 27, 1981, Mrs. Marian J. Meehan delivered premature twins.

2. In their Complaint, plaintiffs allege treatment by Dr. VanWagoner resulted in brain damage to the twins following premature labor and delivery.

3. The Notice of Intent to Commence a Medical Malpractice Action was dated August, 1988.

4. Since 1976, Utah has adopted a two-year discovery or four-year limitations period for medical malpractice actions.

> No malpractice action against a health care provider may be brought unless it is commenced within two years after plaintiff or patient discovers or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence.

Section 78-14-4(1), Utah Code Ann. (Supp. 1976).

5. In 1979, the Utah Legislature amended this statute of limitations as follows:

> The provisions of this section shall apply to all persons, regardless of minority or other legal disability . . . . any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

Section 78-14-4(2), Utah Code Ann. (Supp. 1979).

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. This action is a medical malpractice action against a health care provider, which is governed by the Utah Health Care Malpractice Act, Section 78-14-4(1), et seq., Utah Code Ann. (1953 as amended).

2, The statute of limitations encoded in Section 78-14-4(1) applies regardless of minority or any other legal disability pursuant to Section 78-14-4(2).

3. Plaintiffs were required as a matter of law to initiate their medical malpractice claim within four years after the date of the alleged neglect.

4. Plaintiffs' Complaint, initiated seven years after the medical care here at issue, is absolutely time-barred by the applicable statute of limitations.

5. This Court must bow to the presumption of the validity of the Legislature's action in amending the applicable statute of limitations so as to specifically apply the statute regardless of disability or minority. This Court does not presume to second-guess the Legislature and will, therefore, not assess the strength or weaknesses of plaintiffs' constitutional claims.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, as well as on the memoranda submitted by the parties, the Court denies the plaintiffs' Motion to Strike defendant's statute of limitations defenses and grants the defendant's Motion to Dismiss and orders that plaintiffs' Complaint be, and the same is hereby, dismissed with prejudice pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure, with each party to bear its own costs.

DATED this 29 day of October, 1990.

BY THE COURT:

Pat B. Brian
District Court Judge

23\EKB\10224.574\findings.etc

AFFIDAVIT OF MAILING

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

MARIE B. VAN WENSVEEN, being duly sworn, says that she is employed in the law office of Snow, Christensen & Martineau, attorneys for defendant J. Dallas VanWagoner, M.D. herein; that she served the attached Findings of Fact, Conclusions of Law and Order (Case No. 890900111CV, Salt Lake County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Attorneys for Plaintiff
Roger P. Christensen, Esq.
Richard L. Evans, Jr.
CHRISTENSEN, JENSEN & POWELL
175 South West Temple, Suite 510
Salt Lake City, Utah 84101

and causing the same to be mailed first class, postage prepaid, on the 16th day of October, 1990.

Marie B. Van Wensveen

SUBSCRIBED AND SWORN to before me this 16th day of October, 1990.

Linda M Hamilton
NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:
5-28-91